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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1433

TELEVISION RECEPTION CORPORATION, Petitioner,

versus

COMMONWEALTH CABLE COMPANY, - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. _____

TELEVISION RECEPTION CORPORATION, - *Petitioner,*

v.

COMMONWEALTH CABLE COMPANY, - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Television Reception Corporation, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on January 22, 1975.

OPINIONS BELOW

The opinions of the Court of Appeals of January 22, 1975, and July 15, 1971, which are not reported, appear in Appendices A and C hereto, respectively. The opinion of the Court of Appeals of June 24, 1970, is reported at 426 F. 2d 174, and appears in Appendix B hereto. The opinion of the District Court for the Eastern District of Kentucky, which is not reported, appears in Appendix D hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on January 22, 1975. A timely petition for rehearing, with suggestion that rehearing be *en banc,* was denied on March 25, 1975, and this petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether the Court of Appeals denied Petitioner due process of law when it refused to consider a valid defense to Respondent's Counterclaim and thereby allowed unconstitutional state action to stand unchallenged?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved in this Petition are the Due Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States. The pertinent text of those Amendments is set forth in Appendix E hereto.

STATEMENT OF THE CASE

In 1958, the City of Somerset, Kentucky, awarded a cable television franchise to Petitioner, Television Reception Corporation. Then, on two separate occasions in 1959, the City Council of Somerset attempted to revoke that franchise for Petitioner's alleged failure

to have its CATV system operative within six months after the granting of the franchise.

However, the City did not give Petitioner prior notice that revocation of its franchise would be considered at either meeting. Nor was Petitioner given an opportunity to present evidence on the factual questions related to the City's attempted revocations.

In 1966, the City awarded a new CATV franchise to Dunbar-Murphy & Co., which assigned it to the Respondent, Commonwealth Cable Co. Soon afterward, the present action was commenced in the District Court for the Eastern District of Kentucky when Petitioner sued Dunbar-Murphy for reasons not now relevant. The District Court's jurisdiction rested on the diversity of citizenship between Petitioner and Dunbar-Murphy.

When the Respondent, Commonwealth Cable, was made a defendant in this action, it filed a counterclaim against Petitioner alleging that Petitioner was tortiously usurping Respondent's franchise rights by continuing to operate its CATV franchise.

Petitioner's defense to that counterclaim rests ultimately upon the unconstitutionality of the City of Somerset's attempt to revoke Petitioner's franchise without notice or a prior hearing. Kentucky law is well-settled that a colorable claim of title to a competing franchise is a complete defense to the tort of franchise usurpation. Petitioner's defense was that it still retained a valid franchise, or at least colorable claim to a valid franchise, because the City's attempt to revoke Petitioner's franchise failed to comply with the requirements of due process of law.

After a trial to the bench, the District Court entered judgment for the defendants on both Petitioner's complaint and Respondent's counterclaim. On the first appeal, the Sixth Circuit vacated and remanded for reasons not now relevant.

One of Petitioner's contentions on the first appeal was that the federal courts did not have jurisdiction of this case because the City of Somerset was an indispensable party to the adjudication of Commonwealth's counterclaim, and that joinder of the City as an indispensable party would defeat diversity. The Court of Appeals, however, held that the City was not even a necessary party.

Thereafter, Petitioner brought a direct action in state court against the City of Somerset, alleging that the City's attempt to revoke Petitioner's franchise contravened due process and seeking declaratory relief that its franchise remained valid. However, Respondent moved the federal court to enjoin the state court proceedings and the federal court issued the injunction, holding that the issues raised in state court would be adjudicated in the present litigation. The Sixth Circuit affirmed the injunction.

After the hearing on remand, the District Court again entered judgment for Respondent on its counterclaim and ordered Petitioner to dismantle its CATV system and to pay damages to Respondent in an amount equal to all the profits Petitioner had earned from its CATV system after respondent was awarded a competing franchise.

On appeal, the Sixth Circuit expressly refused to consider the merits of Petitioner's defense that it had colorable claim to a franchise because of the City's denial of due process to Petitioner when it attempted to revoke Petitioner's franchise without notice or a hearing.

The Sixth Circuit now held that Petitioner's defense was an attack on the franchise revocation which could be raised only in a direct action against the City, and the Court now held that this direct action "would require the joinder of the City of Somerset as a party," which would defeat diversity jurisdiction. However, the Court did not dismiss for want of jurisdiction. Nor did it dissolve the injunction against Petitioner's direct action in state court, although it now held that was the only forum in which Petitioner could raise its constitutional argument against the City. Instead, the Court affirmed the judgment for Respondent without even considering the merits of Petitioner's constitutional defense.

When these inconsistent holdings were brought to the Court of Appeals' attention on petition for rehearing, the Court denied the petition without opinion.

REASONS FOR GRANTING THE WRIT

The Court of Appeals Denied Petitioner Due Process of Law By Refusing to Consider a Valid Defense to Respondent's Counterclaim, Thereby Allowing Unconstitutional State Action to Stand Unchallenged.

The principle defense raised below by the Petitioner to the claim of usurpation of a franchise is that the failure of the City of Somerset to afford Petitioner a "due process hearing" before it revoked Petitioner's franchise vitiated the attempted revocation, leaving Petitioner with a valid franchise, or at least a colorable claim to a valid franchise, either of which is, under Kentucky law, a complete defense to the claim of usurpation of a franchise.

However, through three conflicting decisions, the Court of Appeals has affirmed the judgment holding that Petitioner usurped Respondent's franchise without ever passing on the merits of Petitioner's defense. Indeed, the cumulative effect of the Court of Appeals' three decisions in this case is that Petitioner has been denied the right to raise a valid defense to Respondent's counterclaim in federal court and, at the same time, has been enjoined by the federal courts from litigating the constitutional question which is the basis of that defense in state court.

Specifically, the Court of Appeals has held that Petitioner's constitutional claims can only be raised in a proceeding to which the City of Somerset is a party and, therefore, that the City is an indispensable

party to this litigation. However, the Court has also held that joinder of the City would defeat the diversity jurisdiction on which this action is premised. Yet, instead of dismissing the action for want of jurisdiction, the Court has told Petitioner to raise its constitutional claims by suing the City in state court; but the Court has also affirmed the District Court's injunction against Petitioner's direct state court action against the City. Finally, the Court of Appeals has now summarily affirmed the judgment for Respondent without considering the merits of Petitioner's constitutional defense.

The cumulative effect of the Court of Appeals' three decisions is that the constitutional infirmities of the City's action in taking Petitioner's property cannot be adjudicated in state or federal court, and the judgment of usurpation has been affirmed while a sound defense to that judgment has not even been considered, even though the defense is of constitutional dimensions.

This result clearly conflicts with the most basic elements of the Fifth Amendment's due process requirements and has so far departed from the proper course of judicial proceedings as to call for the exercise of this Court's power of supervision.

Furthermore, the Court of Appeals' affirmance of both the judgment in this action and the injunction against the state court action leaves standing the City's revocation of Petitioner's franchise without the "due process hearing" required by a number of this Court's

very recent cases.[1] The Court of Appeals' decision, therefore, also conflicts in principle with those cases.

The Court of Appeals' decision that joinder of the City would defeat diversity jurisdiction in this case also conflicts in principle with decisions of this Court. Diversity jurisdiction is tested according to the facts as they existed when the action was initiated and is not defeated by the subsequent joinder of nondiverse parties. *See, e.g., Wichita R.R. & Light Co.* v. *Public Util. Comm.*, 260 U. S. 48, 53-54 (1922); *Hardenbergh* v. *Ray*, 151 U. S. 112, 118-19 (1894); *Phelps* v. *Oaks*, 117 U. S. 236 (1886). The Sixth Circuit recognized this maxim in its first opinion in this case when it held that joinder of the Respondent did not defeat diversity jurisdiction despite the fact there is no diversity jurisdiction between Petitioner and Respondent. *See*, p. B-5, 426 F. 2d at 177-78. Accordingly, the joinder of the City as an indispensable party to Petitioner's defense to Respondent's counterclaim would not defeat diversity.

Furthermore, if the City is an indispensable party whose joinder would defeat diversity, the Court of Appeals should have dismissed for want of federal jurisdiction rather than affirming the judgment which was rendered without joinder of an indispensable party. *See, e.g., Travelers Indemnity Co.* v. *Westinghouse Elec. Co.*, 429 F. 2d 77, 79-80 (5th Cir. 1970); *Provident Tradesmens Bk. & Trust Co.* v. *Lumbermens Mut. Cas. Co.*, 365 F. 2d 802 (3rd Cir. 1966); *Lewis* v.

[1] *See, e.g., Perry* v. *Sindermann*, 408 U. S. 593 (1972); *Fuentes* v. *Shevin*, 407 U. S. 67 (1972); *Bell* v. *Burson*, 402 U. S. 535 (1971); *Goldberg* v. *Kelly*, 397 U. S. 254 (1970).

Lewis, 358 F. 2d 495, 501-02 (9th Cir. 1966); *Stevens* v. *Loomis,* 334 F. 2d 775 (1st Cir. 1964); *Mashak* v. *Hacker,* 297 F. 2d 495, 496-97 (7th Cir. 1961); *Matthies* v. *Seymour Mfg. Co.,* 270 F. 2d 365, 368 (2nd Cir. 1959); *Young* v. *Garrett,* 149 F. 2d 223, 228 (8th Cir. 1945). The Court of Appeals' decision is therefore also in conflict with these decisions of other Circuits.

In sum, once it held that the City was an indispensable party to the adjudication of Petitioner's defense, the Court of Appeals should have either dismissed for lack of diversity jurisdiction or remanded for a retrial after the joinder of the indispensable party. Instead, the Court simply affirmed the judgment without even considering Petitioner's defense and told Petitioner to litigate its defense in a separate proceeding against the City, despite the fact that Petitioner had been enjoined from bringing such a proceeding. In so holding, the Court of Appeals has denied Petitioner due process of law and has allowed the unconstitutional actions of the City to stand unchallenged.

The procedural snarl created by the Court of Appeals' three inconsistent opinions could be resolved in any of three ways. The Court could dissolve the injunction against the state court proceeding and stay proceedings in this case pending the outcome of that litigation. *See, e.g., City of Meridian* v. *Southern Bell T. & T. Co.,* 358 U. S. 639 (1959). Or the Court could reverse and remand for further proceedings, holding that joinder of the City as a defendant would not defeat diversity any more than did the joinder of Respondent. *Wichita R.R. & Light Co.* v. *Public Util.*

Comm., supra. Or the Court could dismiss for want of federal jurisdiction. *Provident Tradesmens Bk. & Trust Co.* v. *Lumbermens Mut. Cas. Co., supra.*

In any event, the Court of Appeals' affirmance without even considering Petitioner's constitutional defense cannot be allowed to stand.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the U. S. Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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